



January 30, 2004

Jennifer J. Johnson, Secretary  
Board of Governors of the Federal Reserve System  
20<sup>th</sup> Street and Constitution Avenue, NW.  
Washington, DC 20551

Docket No: R-1168

Re: Equal Credit Opportunity  
68 FR 68786 (December 10, 2003)

Dear Ms. Johnson:

America's Community Bankers ("ACB")<sup>1</sup> welcomes the opportunity to comment on the proposal issued by the Board of Governors of the Federal Reserve System (the "Board") to amend Regulation B, the implementing regulation for the Equal Credit Opportunity Act ("ECOA") and the accompanying commentary.<sup>2</sup> The proposed amendments would define more specifically the standard for providing "clear and conspicuous" disclosures, with a goal of providing a more uniform standard for disclosures required by the Board's regulations.

### **ACB Position**

As a general matter ACB supports reduction of regulatory burden on insured depository institutions as they provide the disclosures required by a variety of consumer protection laws. Further, we support the goal of ensuring that the disclosures are as clear and understandable as possible for consumers.

However, we strongly oppose this proposal. We do not believe that this proposal meets the goals the Board has established in issuing the proposal. We do not believe that this proposal would ensure that consumers receive noticeable and understandable information

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<sup>1</sup>America's Community Bankers represents the nation's community banks. ACB members, whose aggregate assets total more than \$1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

<sup>2</sup> 68 Fed. Reg. 68786 (December 10, 2003).

that is required by law in connection with obtaining consumer financial products and services. We also do not believe that consistency among regulations would facilitate compliance by institutions.

ACB urges the Board to withdraw the proposal. We believe that it would cost the industry billions of dollars to retool forms and ensure that all forms meet the revised standards. All current forms and agreements would have to be reviewed for compliance and likely would have to be revised and preprinted. In addition, the proposal would require that many forms be reprinted in a larger type size than that which is currently being used, which would lengthen the disclosures and increase mailing and postage costs.

Finally, the proposed changes expose insured depositories to significant litigation risk. Liability for not meeting the “clear and conspicuous” standard would be significant and the institution could be required to pay “statutory damages” even if the disclosures themselves are completely accurate, even if the consumer is not harmed, and even if the consumer does not detrimentally rely on the disclosures. Further, additional liability under state unfair and deceptive statutes throughout the country may be imposed.

ACB does not believe that the Board has shown that the benefit of implementing the proposed changes outweighs the burden, both in terms of financial and human resources. We do not believe that non-substantive changes such as the ones proposed should be made at a time when insured institutions are struggling to implement a number of regulatory changes and making plans for implementing others.

## **Proposal**

The Board has issued a proposal that would amend Regulation B and the accompanying commentary to add a definition of “clear and conspicuous” that would be consistent with the definition contained in Regulation P, Privacy of Customer Financial Information. Currently, Regulation B provides that disclosures must be “clear and conspicuous” and the commentary provides that the disclosures must be “in reasonably understandable form.” Regulation P currently defines the “clear and conspicuous” standard to mean that the disclosure is “reasonably understandable and designed to call attention to the nature and significance of the information.” The Board believes that the recently implemented standard in Regulation P is a more precise explanation of the concepts underlying the duty to provide disclosures that consumers will notice and understand.

## **ACB Opposes Proposal**

ACB believes that amending the regulation and accompanying commentary as contemplated in the proposal would place an unreasonable burden on institutions as they comply with the disclosure requirements. We note that the timing of the proposal provides several reasons that we do not believe that the Board should proceed with the proposed changes at this time.

The Board has not provided evidence that the current disclosures have caused confusion or problems among consumers. The current standards have been in place for a number of years, and we have not heard that there have been concerns regarding the creation of compliant disclosures under these standards. In addition, consumers have received disclosures produced under the current standards, and we are not aware of any consumer confusion or problems in that regard. We do not believe that there is a problem with the current standards. The Board has not provided examples or explanation of when the current standards have not been appropriate. Absent evidence of a problem, this is a “make work” assignment whose timing could not be worse given all of the other substantive compliance issues institutions are faced with today.

The federal banking agencies and the other agencies with rulemaking authority for the regulations implementing the Privacy and Consumer Financial Information jointly have issued an advanced notice of proposed rulemaking (“ANPR”) seeking comment on several short form privacy notices. The ANPR also requests comments on how to improve the disclosures required under Regulation P. In particular, in the ANPR, the agencies expressly state that they are considering amendments to the privacy rule “to provide for privacy notices that are more understandable and useful to consumers.”<sup>3</sup> Furthermore, the agencies are seeking comment on “issues associated with the format, elements, and language used in privacy notices.”<sup>4</sup> We believe that the Board should not consider amending disclosures required by other consumer protection regulations to be consistent with Regulation P when, in fact, Regulation P is itself in a state of flux.

In addition, Regulation P requires privacy notices that are generally uniform in nature for the institutions making the disclosures. These disclosures are stand-alone documents that do not change based on the consumer or the transaction. The disclosures required by the other consumer protection regulations that the Board is proposing to amend are frequently transaction-based disclosures for which it would be impossible to use a uniform disclosure.

Finally, use of the Regulation P model is an inappropriate disclosure model because it would significantly increase the risk of civil liability to financial institutions. If a financial institution fails to correctly apply the “clear and conspicuous” disclosure standard under Regulation P, an individual cannot bring a private action. On the other hand, if an institution fails to comply with the “clear and conspicuous” standard under Regulation B, it can be held strictly liable for doing so. As a result, institutions would be exposed to a significant risk of liability and could be required to pay “statutory damages” even if the disclosures themselves are completely accurate, even if the consumer is not harmed, and even if the consumer does not detrimentally rely on the disclosures. In addition, violation of the other consumer regulations also can give rise to liability under state unfair and deceptive statutes throughout the country. As a result, the risks and consequences of failing to comply with the format requirements are dramatically different under Regulation P and the other consumer protection regulations.

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<sup>3</sup> 68 Fed Reg 75164 (December. 30, 2003).

<sup>4</sup> *Id.*

Another interagency regulatory initiative that is underway is the review of all regulations required by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"). This multi-year project is an interagency review of all of the regulations promulgated by the federal banking agencies. In an effort to make the project more manageable, the agencies are requesting comment on regulations in substantive groups. The agencies have issued a request for comments and recommendations on how to reduce the regulatory burden imposed by the consumer protection: lending-related rules.<sup>5</sup> This comment period closes on April 20, 2004. The agencies have requested comments on how to reduce the regulatory burden on insured institutions in the broader consumer protection: lending-related rules area, but specifically, the agencies have requested comments on three of the five regulations for which the Board is proposing to amend the disclosures.<sup>6</sup>

If the Board determines that it should amend the disclosures as contemplated in the proposal, ACB urges the Board to not proceed until the results of the ANPR on the Regulation P disclosures and the results of the EGRPRA review have been completed. Requiring changes before those reviews have been completed would likely result in another round of changes being required. This would result in significant additional cost and burden on institutions as they develop disclosures in compliance with the regulations.

The proposal would require significant changes to the disclosures required by Regulation B at a cost of millions of dollars and would be very resource intensive to get changed. In addition to the cost of designing new forms that would comply with the requirements, institutions would have the additional cost of increased mailing charges to accommodate disclosures with larger type and wide margins. These costs would be borne by the institution but ultimately the consumer would bear the cost in higher costs for products or services or a reduction in the products and services available.

ACB appreciates the opportunity to comment on this very important matter. We strongly urge the Board to withdraw the proposal. As an alternative to the changes in the proposal, we stand ready to work with the Board to develop disclosures that are understandable to consumers at a time when the burden of changing disclosures would not be overly burdensome on the industry. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 857 3121 or [cbahin@acbankers.org](mailto:cbahin@acbankers.org).

Sincerely,



Charlotte M. Bahin  
Senior Vice President, Regulatory Affairs

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<sup>5</sup> 69 Fed Reg 2852 (January 21, 2004).

<sup>6</sup> *Id.*